No. 82-1217

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

SEYMOUR R. MATANKY, M.D. and
CORBIN MEDICAL CLINIC,

Petitioners,

vs.

UNITED STATES OF AMERICA,
SECRETARY OF HEALTH, EDUCATION
AND WELFARE, AND BLUE SHIELD OF
CALIFORNIA, a corporation,

Respondents.

Judicial Review Pursuant to Article III,
U.S. Constitution and Title 28 U.S.C., Section 1491, and
Fifth Amendment, U.S. Constitution of Medicare Act, Part B
Claims Administrative Review

REPLY BRIEF OF PETITIONERS ON PETITION FOR WRIT OF CERTIORARI

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Come now the petitioners Seymour R. Matanky, M.D. and Corbin Medical Clinic and set forth their reply brief to the respondent The United States of America's "Brief for the Respondents in Opposition,"

filed herein in the above entitled Court on or about May 19, 1983, to-wit:

1. The respondent The United States of America (referred to hereinafter as "the Government") wholly fails to address directly and clearly, what is considered to be the pivotal issue herein, and the critical, substantial constitutional importance to the handling and judicial review of administrative claims under the Medicare Act, Part B, as contained in Title 42 U.S.C., Section 1395ff, et. seq.: whether physicians and patients have a right to judicial review by duly appointed, presiding federal judges under Article III and the due process clause of the Fifth Amendment of the United States Constitution, particularly after adjudication of their claims and grievances by privately employed hearing officers, assigned on a delegation of administrative authority to private insurance carriers, to review constitutional claims, allegations and grievances under Article III, United States Constitution. (Weinberger v. Salfi,

422 U.S. 749; Califano v. Sanders, 430 U.S. 109; Johnson v. Robison, 415 U.S. 361; Chelsea Community Hospital v. Michigan Blue Cross, 630 F.2d 1130).

This failure to respond, specifically, to this critical issue appears to be an admission by the respondent Government that petitioners, like all physicians and patients, are entitled to have access to duly appointed and presiding Article III, U.S. Constitution judges, and may not be deprived of these constitutional rights by legislation or administrative regulation.

2. Each of the issues raised by petitioners is constitutional in nature, and couched in terms of substantial and material, prejudicial, substantial, per se, plain, harmful consitutional level violations. (Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705.)

The respondent Government misreads and overlooks the specific statement by this United States Supreme Court in United States v. Erika,

Inc., 456 U.S. 201, 72 L.Ed.2d 12, 102 S.Ct. 1650 in its most inaccurate and inappropriate remark that petitioners seek to avoid the United States v. Erika, Inc. ruling.

This United States Supreme Court stated in United States v. Erika, Inc., 456 U.S. 201, 72 L.Ed.2d 12, at 20, in footnote 14, that it did not reach any constitutional level issues to-wit:

> "14. . . In response to questioning at oral argument, respondent (Erika, Inc.) answered that it was asserting a constitutional right to judicial review of Prudential's Part B determination. Tr of Oral Arg 39. Respondent, however, neither argued this ground in the Court of Claims, included it among the questions presented to this Court in its brief in opposition or in its brief on the merits, nor devoted any substantial briefing to it. We consequently do not address the issue. See this Court's Rules 34.2 and 22.1: cf. Neely v. Martin K. Eby Construction Co., Inc. 386 US 317, 330, 18 L.Ed 2d 75, 87 S Ct 1072 (1967)." (Erika, Inc. clarification added on line two of quote.

This Court did not reach or decide the issue of the right to have access to Article III federal judges in United States v. Erika, Inc., 456 U.S. 201 for judicial review of administrative determinations.

3. If the United States Court of Claims does not have jurisdiction over the monetary claim, as asserted by the respondent U.S. Government, although the U.S. Court of Appeals for the Ninth Circuit so concluded in Drenan v. Harris, 606 F.2d 846, and although the U.S. District Court for the Central District of California so concluded, based on Drenan v. Harris, supra, in transferring this matter at bar to the U.S. Court of Claims, then it had no subject matter jurisdiction to make a determination on the merits of the federal constitutional level claims involved and materially, substantially, plainly erred in purporting to do so. Its order is void for lack of jurisdiction.

It appears the U.S. Court of Claims bypassed and failed to adjudicate the first, foundational issue herein, that is, whether it had the jurisdiction to determine jurisdictional issues in the first place. The respondent Government clearly advocates and concludes that the U.S. Court of Claims did not have this jurisdiction to make a

determination on subject matter jurisdiction. It would appear this Court holds a U.S. District should make those determinations, as reflected in Schweiker v. McClure, 72 L.Ed.2d 1. Petitioners herein moved to transfer this action back to the U.S. District Court where the complaint was first filed, and again so moved.

It is respectfully submitted that whoever hears and determines the matter is required to evaluate the concstitutional claims on the merits whether a claim has been stated, not merely dismiss the involved action. (Hagans v. Lavine, 415 U.S. 528; Bell v. Hood, 327 U.S. 678, 90 L.Ed. 939.)

Even the respondent the Government now attempts to litigate factual issues concerning constitutional issues of estoppel before this Court and for the first time, seeing that its position is meritless. But the litigation of facts is for a trier of fact at the trial level, not on a petition for writ of certiorari in the United States Supreme

Court on appellate review. In a back-handed way, the Government agrees with petitioners that material, constitutional, factual issues are present here concerning which the petitioners are entitled to a trial on the merits. (Conley v. Gibson, 355 U.S. 41, 2 L.Ed.2d 80 (1957); Bell v. Hood, 327 U.S. 678, 90 L.Ed. 939; Leone v. Aetna Casualty & Surety Co., 599 F.2d 566.)

This is not the trial court. The issues discussed concerning other litigation about Dr. Matanky were not raised below. Neither at the administrative level, nor in its answer to the complaint of Dr. Matanky (see, Appendix B-1 through B-8 of petition for writ of certiorari) nor in its motion to dismiss in the U.S. Court of Claims did the Government raise any collateral factual issues concerning other unrelated litigation Dr. Matanky was involved in. Those matters were excluded from consideration. Therefore, petitioners move to strike said references on the ground that the respondent has no standing to raise these

matters in this Court, having waived its opportunity to do so in the lower courts and in this Court.

4. As this United States Supreme Court has stated in Hagans v. Lavine, 415 U.S. 528, at 542, 39 L.Ed.2d 577, 94 S.Ct. 1372, to-wit:

> "We think the admonition of Bell v Hood, 327 US 678, 90 L Ed 939, 66 S Ct 773, 13 ALR2d 383 (1946), should be as followed here:
>
> > 'Jurisdiction . . . is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.' Id., at 682, 90 L Ed 939, 13 ALR2d 383 (citations omitted).[10]"

5. The respondent Government asserts for the first time in this Court that petitioner's constitutional allegations are "frivolous," as a basis for denying a petition for writ of certiorari. This bootstrap argument is meritless, and petitioners move to strike it on the grounds that it has not been litigated below in its "merits" and is raised for the first time in this Court on appellate review.

This Court also stated in Hagans v. Lavine, 415 U.S. 542 at 542-543, 39 L.Ed.2d 577:

> "[7] As was the case in Bell v Hood, we cannot 'say that the cause of action alleged is so patently without merit as to justify, even under the qualifications noted, the court's dismissal for want of jurisdi ction.' Id., at 683, 80 L Ed 939, 13 ALR2d 383. Nor can we say that petitioners' claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits.' Oneida, 414 US 66, 666-667, 39 L Ed 2d 73, 94 S Ct 772 (1974). (Citations omitted.)"

Constitutional claims are entitled to review in the appropriate trial level federal courts, and your petitioners are entitled to equal protection and access to the court to have same litigated as they meet the above set forth pleading standards. (United States v. James Stewart Co., 336 F.2d 777 (9th Cir. 1964); Conley v. Gibson, 355 U.S. 41.) Due Process issues about recoupment and estoppel to recoup due to the bar of the statute of limitations are factual issues concerning which your petitioners are entitled to have a trial on the merits by an Article III judge.

6. If the U.S. Court of Claims must dismiss for want of jurisdiction, it did not have power to decide the case one way or the other. (The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25, 57 L.Ed. 716, 33 S.Ct. 410; Hagans v. Lavine, 415 U.S. 528, 39 L.Ed.2d 590). This Court has the jurisdiction and mandate of the U.S. Constitution to remand this case to the U.S. District Court for trial of constitutional issues.

WHEREFORE, petitioners pray for reversal.

Dated June 3, 1983.

Respectfully submitted,

JOAN CELIA LAVINE

Attorney for Petitioners